L & L Wine and Liquor Corporation *and* Local 337, International Brotherhood of Teamsters, AFL–CIO. Cases 7–CA–37619 and 7–CA–38205

May 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On January 24, 1997, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, L & L Wine and Liquor Corporation, Troy, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

John Ciaramitaro, Esq., for the General Counsel.
Thomas H. Oehmke, Esq. and *Joan Brovins, Esq.*, for the Respondent.
Charles Isom, for the Charging Party.

DECISION

STATEMENT OF CASE

ALBERT A. METZ, Administrative Law Judge. This case was heard at Detroit, Michigan, on October 21–23, 1996.[1] Local 337, International Brotherhood of Teamsters, AFL–CIO (the Union) has charged that L & L Wine and Liquor Corporation (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All subsequent dates refer to the time period March 1995 through February 1996 unless otherwise indicated.

I. BACKGROUND

The Respondent operates a liquor distribution business in Troy, Michigan. The Union and the Respondent have had a collective-bargaining relationship for over 20 years covering a unit of drivers, helpers, and warehousemen. In August 1995 the unit consisted of approximately 16 employees. The parties' most recent collective-bargaining contract had effective dates of July 1, 1994, to June 30, 1995. That agreement was a 1-year extension to the parties' former 3-year contract with certain modifications. The extension had been agreed to only after lengthy bargaining lasting over approximately 5 months.

Bill Menser has been the Union's longtime steward at the Respondent's operations. In October 1994 the parties were engaged in negotiating changes to their collective-bargaining agreement. During that month Menser had two conversations with the Respondent's executive vice president, Steven Lewis. In the first dialogue Lewis said that the Respondent could do a lot of things without the Union. In the second, about a week later, Lewis again said that without the Union the Respondent would be free to "do things." Lewis explained that he did not mean to cut anyone's wages or get rid of any employees, but the collective-bargaining agreement's insurance was so expensive that he would like to be free to do things without the Union.

Employee Scott Watson testified that in the latter part of November 1994 he also had a conversation with Steven Lewis. Watson was curious about the status of the ongoing collective-bargaining negotiations and asked Lewis about the matter. Watson recalled Lewis saying during that conversation: "To be honest with you, we could do wonderful things without the union. . . . It's kind of holding back what we could do financially for each individual. [Y]ou could get a decent pay increase without having union representation. . . . If I can do anything about it, I will. . . . Mark my words. If I can, I will remove the union's representation." Steven Lewis denied that he had ever said that he would try to get rid of the Union. I do not credit Lewis' denial and based on the demeanor of the witnesses do credit Watson and Menser as to Lewis' historical statements about the expense of the insurance and wanting to get rid of the Union.[2]

II. MARCH CONVERSATION BETWEEN MCCAIN AND MENSER

Menser testified that in March 1995 he was in the office when his supervisor, Warehouse Manager Scott McCain, asked him how he thought things would be in the warehouse without the Union. Menser told him he thought things would not be good. McCain said that is what the Respondent would like and Steve Lewis would like to get rid of the Union. McCain continued to say that "things" would be a lot rougher with the next contract negotiations because they wanted to get rid of the Union. Menser's testimony was uncontroverted by McCain. Menser was a believable witness whom I credit. I find that McCain's interrogation of Menser about his union sympathies and the threat to engage in

[2] All the 1994 conversations are outside the Act's 10(b) period of limitations.

"rough" bargaining in an effort to get rid of the Union is coercive conduct and violates Section 8(a)(1) of the Act.

III. PRELIMINARY BARGAINING EVENTS

On April 5, 1995, the Union sent a letter to the Respondent opening the contract for negotiation and listing 13 areas it wanted to discuss. The letter was mistakenly sent to Respondent's old address and was not received. The Union learned of the error and faxed a copy of the letter to the Respondent on April 18. On May 11 the Respondent hired Attorneys Thomas Oehmke and Joan Brovins to represent it in bargaining and the law firm advised the Union of its retention in a letter sent the same day.

IV. ISOM'S COMPLAINTS OF RESPONDENT'S UNDERMINING THE UNION

On May 12 Union Business Representative Charles Isom sent a letter to Milford Lewis, Respondent's chairman, complaining about reports he had received of the Respondent attempting to undermine the Union's representative status. (G.C. Exh 5.) The letter states that Steve Lewis and Scott McCain were seeking to get members to withdraw from the Union and making economic promises on pay and insurance. Isom concludes by noting that it had been "approximately 45 days" since the Union had sent contract proposals to the Respondent and nothing had been heard from the Respondent on setting up meetings.

On May 12 Respondent's attorney, Thomas Oehmke, sent a letter of reply to Isom and denied any effort to undermine the Union. Oehmke also notes that he sent a letter the previous day seeking contract proposals from the Union and promising a prompt response about negotiations. On May 24 Isom faxed a copy of his April 5 bargaining proposals to Oehmke.

V. JUNE 6 CONVERSATION BETWEEN LEWIS AND MENSER

Menser testified that on June 6 he was approached by Steven Lewis in the warehouse checkout room. Lewis complained about the union insurance plans being too costly. Lewis said that without the insurance the Respondent could do a lot of things with the money such as give employees bigger raises and other incentives. Lewis said that the Respondent needed someone under McCain to work with the drivers and warehousemen and that they would like that person to be Menser. Lewis told him that there would be more money involved. Menser asked Lewis if it was the Union he was trying to get rid of, and Lewis replied, "Yes." Lewis continued that he would like to do things his way without dealing with the Union, Charlie Isom, or being afraid of talking to his workers because charges might be filed with the Labor Board. Menser said he could not agree to what Lewis was proposing. Lewis told Menser that their conversation was to be "off the record" and that if Menser ever mentioned it he would deny that the meeting ever happened.

Lewis testified that he did have an "off the record" conversation with Menser because he had heard a rumor about the employees wanting to strike. Lewis was equivocal about whether he told Menser that he would deny the conversation:

> Q. Did you tell Bill Menser in this one on one off-the-record conversation that if the conversation ever came up, you'd deny it happened—
> A. I don't recall—
> Q. —or something to that effect?
> A. No, I didn't. [Tr. 386.]

Lewis admitted that he raised the issue of costs for the union health insurance becoming "outrageous." Lewis denied that he told Menser he wanted to get rid of the Union or that he in any way tried to bribe or pay off Menser. Lewis stated that he merely wanted to create a position for Menser where the Respondent could have better communication with the unit employees: "I felt that I couldn't approach any of these drivers and say anything and have one on one dialogue. I . . . was running fearful that anything I said would be used against me eventually."

Steven Lewis was not a convincing witness either by way of his demeanor or his equivocal testimony. Menser was persuasive both as to his demeanor and the detail of his testimony. I credit Menser's version of his encounter with Steven Lewis. I find that by dealing directly with Menser, telling him the Respondent wanted to get rid of the Union, giving employees raises and other incentives SEASA, and by attempting to induce him to accept a promotion, the Respondent was seeking to undermine the Union's representative status. Lewis' actions are found to be a violation of Section 8(a)(1) and (5) of the Act. *Fisher-Haynes Corp. of Georgia*, 262 NLRB 1274, 1279–1280 (1982); *Industry Products Co.*, 251 NLRB 1380, 1386 (1980).

VI. THE JUNE 13 BARGAINING MEETING

The parties agreed that the first collective-bargaining session would be held on June 13. At that meeting the Union was represented by Business Representative Charles Isom and Menser. The Respondent was represented by Oehmke, Brovins, Steven Lewis, Vice President of Finance David Gaul, and Scott McCain. The discussion in the meeting centered on the Respondent's concern for the cost of the Union's health insurance plan. The parties agreed that within 2 weeks the Respondent would send a counterproposal to the Union. The Union would study the proposal and then contact the Respondent to set up the next negotiation meeting. In the meantime the Union agreed to send information to the Respondent about the health plan that currently covered the employees. The Respondent stressed that it was eager to conclude the negotiations as quickly as possible. The Union sent the requested health plan information to the Respondent the next day.

VII. MCCAIN'S STATEMENTS TO MENSER AFTER THE BARGAINING MEETING

On June 14, the day following the bargaining meeting, Menser was in McCain's office. McCain brought up the bargaining and asked Menser how he thought the negotiations were going. Menser replied that he thought they should have gotten more out of it, and Isom did not think the Respondent was well prepared for the meeting. McCain replied that the Respondent was well prepared and the meeting went just as they planned. He continued that Isom was "not going to like what happens . . . when he sees the contract . . . language changes, because it leaves the union completely out."

McCain then asked if Steve Lewis had ever asked Menser if he could be bought. Menser replied that Lewis had already tried that. McCain asked, "By making you a manager?" Menser said, "Yes." McCain replied, "No . . . I mean with cash." McCain continued that he had told Steve Lewis he did not think Menser could be bought and that Lewis had said, "Well, maybe we can buy Charlie Isom."

McCain denied that he had ever tried to buy off, bribe, or influence Menser in any way, including offering him a better job. McCain did not testify specifically regarding the June 14 meeting with Menser.

I found McCain's general denial and demeanor while testifying to this incident to be obscure and unconvincing. Menser, in contrast, by his demeanor and specific recollection of the conversation, was persuasive. I credit Menser's recitation of the event. This incident was fully litigated by both parties at the hearing. The General Counsel urges that McCain's question to Menser about how he thought negotiations were going is an unlawful interrogation. I disagree. Menser was the union steward and a representative of the Union in the negotiating meeting. I find McCain's introductory inquiry was not, under all the circumstances, a violation of Section 8(a)(1) of the Act. I do, however, find that McCain's additional statements were coercive threats aimed at undermining the Union in collective bargaining. McCain stated the futility of bargaining because the Union was going to be left "completely out." He also related the managers' discussions about attempting to bribe the Union's steward and business agent. I find that these statements sought to damage the Union's representative status and are a violation of Section 8(a)(1) and (5) of the Act.

VIII. MCCAIN'S STATEMENTS TO TOM FORD

Driver Tom Ford testified that he had failed a drug test but the Respondent continued to employ him as a warehouseman. McCain mentioned this to Ford one day while they were alone in McCain's office. McCain said that Ford was lucky to still have a job and that he would try to keep him employed. McCain told Ford that things would be good without a union, including raises, and he hoped that Ford would be a "no vote against the union." Ford's testimony was uncontroverted by McCain.

Ford was asked when this conversation took place. He was unable to say other than it was sometime in calendar year 1995. The first charge in this case was filed on August 29, 1995. Ford was unable to place the conversation within the 6-month 10(b) period preceding the filing of the charge. Thus, I find that the General Counsel has not proven by a preponderance of the evidence that McCain's statements to Ford violated the Act. I do, however, consider McCain's uncontroverted remarks as background reflecting on the Respondent's conduct that occurred within the relevant 10(b) time period.

IX. EVENTS LEADING TO WITHDRAWAL OF RECOGNITION

A. *The Respondent's June 27 Contract Proposal*

On June 27 the Respondent sent its contract offer to the Union. The proposal made a major change in the employees' health plan by eliminating the Teamsters plan that was a benefit in previous contracts. The Respondent's proposal substituted a less expensive insurance plan. The proposal also offered unit employees a 50-cent-an-hour wage increase and other increases in benefits.

B. *The Respondent's July 21 Letter to the Union*

The Respondent received no reply to its transmittal of the contract proposal to the Union. On July 21 Attorney Oehmke wrote a letter to Isom noting the lack of response to the contract proposal. Oehmke suggested eight dates between August 2 and 18 for the parties to meet for their second bargaining session. The Respondent received no reply from the Union to this letter.

Isom took 2 weeks of vacation during the latter part of July and became sick. He was hospitalized for 4 days in late July and early August. Thereafter he worked short workweeks for about 5 weeks as part of his recovery. Isom testified that he did not reply to the Respondent's entreaties about meetings as he did not think there was any urgency in the matter: "Every contract we ever negotiated usually went beyond the expiration date. In fact, the last one, if you notice the dates on the contract, it ended in June 30th, and we didn't settle it until December the 6th."

C. *Respondent Decides to Implement its Contract Proposal*

David Gaul, Respondent's vice president of finance, testified that the Respondent became concerned when no reply was received from the Union regarding the June 27 contract proposal. Gaul states that "toward the second week of August" the Respondent decided to unilaterally implement its contract proposal. The Respondent prepared employee handbooks that contained its proposal to the Union with modifications to certain clauses (e.g., grievance procedure, union security, and checkoff). The Respondent did not notify the Union that it intended to unilaterally implement its contract proposal.

D. *Respondent Seeks Insurance Fund Information*

Robbin Chuman, Respondent's assistant controller, testified that in the approximate period of August 17–23 she attempted to get some information from the Teamsters health insurance fund. She needed data on deductibles, copays, and claim experience to give to the new insurance company the Respondent was going to use for the unit employees. Chuman testified that she initially had difficulty getting all the information. The Teamsters insurance fund said it would not provide her claim information in the absence of a signed waiver from the effected employee. A day or two later Chuman again talked to the fund and was told to come to their office, show her identification, and she would be given the requested documentation. Chuman never did go to the fund, but testified that she eventually got the information she needed.

X. RESPONDENT WITHDRAWS RECOGNITION AND IMPLEMENTS ITS OWN TERMS AND CONDITIONS OF EMPLOYMENT

On August 24 the Respondent held a meeting with the unit employees. They were told that the Respondent was withdrawing recognition from the Union. The employees were each given a handbook that contained their terms and conditions of employment, including changes that effected wages,

merit pay, 401(k) retirement plan, sick leave, health care, uniforms, safety bonus, and overtime. (G.C. Exh. 18(a) and (b).) These changes became effective September 1. According to employee Scott Watson, Respondent's president, Milford Lewis, said, "Listen, guys, all we're trying to do is put money in your pockets."

Also on August 24 the Respondent sent a letter to the Board's Regional Director complaining about the Union's inactivity in regard to bargaining and seeking to file charges against the Union. A letter was also sent to the Union this same day. That letter complains about the Union's inaction in bargaining and its alleged failure to provide requested information regarding the Teamsters' health insurance plans. An entry in an attached chronology mentioned that the Respondent was withdrawing recognition of the Union. The letter concludes that if the Union files an unfair labor practice charge against the Respondent, the Company will file a charge with the NLRB on a "contingency basis." Prior to this letter the Respondent had never communicated to the Union the possibility of withdrawal of recognition or that it considered negotiations at an impasse.

On August 29 the Union's president, Lawrence Brennan, sent a letter to Oehmke challenging the Respondent's withdrawal of recognition. Brennan notified the Respondent that the Union was filing charges and that it was available to bargain on any business day afternoon throughout September. Brennan asked that the Respondent contact Isom to set bargaining dates. The Respondent did not reply to the letter.

On September 1 the terms contained in the Respondent's employee handbook were implemented. On November 13 the Respondent sent a letter to the Union stating that it would no longer contribute to the Union's 401(k) pension fund and that a new administrator and fund would be used. The letter noted that contributions to the Union's pension plan should have ceased effective September 1, but due to a clerical error this had not been done. Thus, the change was being initiated at that time.

XI. ANALYSIS OF WITHDRAWAL ISSUE

The Respondent asserts two theories to support its withdrawal of recognition from the Union and unilateral implementation of its basic proposal: (1) The Union was no longer the majority representative of the employees, and (2) the Union failed to meet and bargain as required by the Act and thus a "constructive impasse" existed.

A. *Alleged Loss of the Union's Majority*

With regard to the first point, evidence was presented that some employees asked the Respondent's representatives about the progress of negotiations. For example, Steven Lewis testified that he felt the Union was not "representing a majority of the people that worked out back there. . . . Based on all of the people that were asking me what's going on all of the time." There is no evidence that any employee informed the Respondent, prior to its withdrawal of recognition, that they no longer wished to be represented by the Union. For example, Steven Lewis testified:

> Q. Prior to September 1st of 1995, did you ever have anyone complain to you that they didn't want to work as a warehouse worker or driver because they would be part of a union shop at L & L?
>
> A. I don't recall specifically that happening, no. [Tr. 396.]

In order to rebut an incumbent union's presumption of majority status an employer must show that the union in fact no longer enjoys majority support or that the employer has a good-faith and reasonably grounded doubt of the union's majority status. The employer asserting the loss of majority support must prove its case by a preponderance of the evidence, and: "[T]he Board will not find that an employer has supported its defense by a preponderance of the evidence if the employee statements and conduct relied on are not clear and cogent rejections of the union as a bargaining agent, i.e. are simply not convincing manifestations, taken as a whole, of a loss of majority support." *Laidlaw Waste Systems*, 307 NLRB 1211–1212 (1992). The asserted loss of majority status may not be arise in the context of the employer's unfair labor practices.

The Respondent has not shown an actual loss of majority support by the Union. Likewise the Respondent has not shown by a preponderance of the evidence that it had a basis for a good-faith doubt of the Union's majority status. Employees' questions to supervisors about the status of negotiations do not support the conclusion that the inquiring employees no longer desired union representation. Nor are the Respondent's arguments that it had trouble hiring employees because of the low contract wage rate and the Union's lack of requests for arbitration "convincing manifestations" of the loss of majority status. I find that the Respondent has not shown by a preponderance of the evidence that there was a good-faith basis for withdrawing recognition of the Union as the collective-bargaining representative of the unit employees.

B. *Impasse Implementation of the Respondent's Contract Proposal*

The Respondent argues in the alternative that it was entitled to implement its contract proposal because of a "constructive impasse" caused by the Union's nonresponsiveness to negotiation meeting requests. In summary the Respondent's proposal was sent to the Union on June 27. The Respondent made the decision to withdraw recognition from the Union in early August. Thus approximately 1-1/2 months passed in this period of time. The Union did not respond to the Respondent's negotiation meeting requests before the announcement on August 24 that it was withdrawing recognition.

The Board has held that a lengthy hiatus in negotiations is not a sufficient objective consideration on which to base a good-faith doubt of majority status. *Spillman Co.*, 311 NLRB 95–96 (1993) (6-month hiatus); *King Soopers, Inc.*, 295 NLRB 35, 38 fn. 11 (1989) (4-month hiatus). The Board also holds that when parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. The Board recognizes two limited exceptions to the general rule: when a union engages in tactics designed to delay bargaining and when economic exigencies compel prompt action. *RBE Elec-*

tronics of S.D., 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

Regarding economic exigency, the Respondent asserted that it was imperative to bargain as expediently as possible because of its concern for the high costs of health insurance and because of its approaching annual busy season of October through December. While these concerns are a consideration in assessing the bargaining, the Board defines economic exigencies as something more:

> Absent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action.
>
> . . . .
>
> Thus, because the exception is limited to only those exigencies in which time is of the essence and which demand prompt action, we will require an employer to show a need that the particular action proposed be implemented promptly. Consistent with the requirement that an employer prove that its proposed changes were "compelled," the employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. [*RBE Electronics of S.D.*, supra at 81–82.]

The Respondent was eager to conclude bargaining as soon as possible. The evidence, however, does not suggest that "economic exigencies" were present under the Board's standards which "compelled" unilateral implementation. The evidence does show that the Respondent was anxious to rid itself of the Union.

Regarding possible union delaying tactics, it is not clear that this was the intent of the Union. Initially, it was the Union that opened the negotiations in April and submitted a proposal to the Respondent to commence the bargaining. The Union promptly sent the Respondent requested insurance information, as promised, the day following the June 13 bargaining meeting. As outlined above, Isom had personal reasons for some of the delay after the June 27 proposal was sent to him. He also testified that past negotiations had traditionally gone on long after the expiration of the contract. While these reasons are not a total excuse for the Union's unresponsiveness, I do not conclude that the evidence sustains a finding that the Union's inattention was a tactic designed to delay the bargaining.[3]

I find disingenuous the Respondent's argument that the failure to obtain information from the Teamsters insurance fund was also a cause of its "constructive impasse" implementation. The Respondent's witness Gaul testified the decision to implement its contract proposal occurred "toward the second week of August." According to Respondent's witness, Chuman, the communications with the insurance fund did not occur until the period of approximately August 17–23. Thus, I conclude that the Respondent had already decided to withdraw recognition prior to Chuman's initial attempts to get the insurance information. In any event Chuman conceded she was offered the information if she went to the fund and properly identified herself. She never took advantage of this offer.

The Respondent's unlawful actions preceding the decision to unilaterally implement its contract offer must also be considered. The Respondent's unfair labor practices were characterized by interrogations, efforts to undermine the Union's representative status, and its threat to eliminate the Union as the employee's representative. Clearly the issue of health insurance costs had been a very troubling matter for the Respondent since at least the 1994 negotiations. The statements to employees about this problem, with the accompanying unlawful threats and promises, amply demonstrate the Respondent's desire to rid itself of the Union.

On balance, I find that the Respondent's August 24 withdrawal of recognition was not justified by the Union's lack of response to its request to set bargaining meetings. Ultimately the Respondent must bear the responsibility for its unlawful conduct prior to the withdrawal of recognition, its lack of proven good-faith doubt of the Union's majority status, and its precipitous implementation of its proposal without any notice to the Union. I find that the Respondent seized on the Union's inaction concerning meetings as an excuse to rid itself of the Union. The Respondent's unilateral implementation of its modified contract proposal and withdrawal of recognition of the Union are found to be violations of Section 8(a)(1) and (5) of the Act. I further find that the November unilateral change of pension administrator and investment funds is also a violation of Section 8(a)(1) and (5) of the Act.

XII. JANUARY 1996 SENIORITY DISPUTE

Employee Thomas Saraceno worked for the Respondent as a driver until after the 1995 Christmas holiday season. At that time he was placed on an on-call status where he was notified to come into work when needed. In addition to his driving duties, Saraceno had about 2 weeks of work experience in the warehouse. Saraceno's supervisor, McCain, assigned two employees (Cagel and Adel) with less seniority than Saraceno to continue doing warehouse work even though Saraceno was in on-call status and had expressed a desire to work in the warehouse.

The collective-bargaining agreement states that seniority controls in such matters as "layoff, recall and earnings opportunities of employees." The contract made no distinction as to the application of seniority between the driver and warehouse classifications.

Saraceno contacted his steward, Menser, and registered a complaint about not getting the warehouse work. Menser spoke to McCain in January about the failure to assign the work to Saraceno. McCain replied that he considered McCain a temporary employee and, in any event, the employees were no longer covered by the contract and seniority would not control assignments. The Respondent presented testimony that Saraceno was not available on some occasions when he was called about working as a driver, and that he was not as experienced at working in the warehouse as Cagle and Adel. Saraceno eventually asked for, and received, a letter from the Respondent noting he was laid off so he could collect unemployment compensation.

[3] Compare: *AAA Motor Lines*, 215 NLRB 793 (1974), where the union's intentional delaying tactics of 2-1/2 months after receiving the employer's proposal (in situation free of any employer unfair labor practices) was sufficient to allow the company to implement certain changes "of immediate concern for employees."

I find the assignment of warehouse work to less senior employees ignored the on-call status of Saraceno. In the absence of a lawful impasse implementation of its contract proposal, the Respondent was not privileged to ignore the terms of the expired contract on a mandatory subject of bargaining such as seniority. The Respondent refused to bargain about the matter and took the position that the Union no longer represented the employees. The Respondent acted at its peril in taking this position. I find that the refusals to apply the seniority provision of the expired contract to Saraceno and to bargain are violations of Section 8(a)(1) and (5) of the Act.

XIII. QUESTIONING OF EMPLOYEES IN PREPARATION FOR THE HEARING

The hearing in this case was originally scheduled for March 1996. In January and February the Respondent talked to the unit employees about the hearing by calling them into individual meetings with management personnel. Most of the meetings were conducted by Scott McCain, while three or four were conducted by David Gaul. Assistant Controller Chuman was also present at many of the meetings. The three managers testified about the meetings as did several of the employees who were questioned. There is little dispute about what typically took place. The individual was called to an office and asked three questions: (1) Did the employee feel he was being properly represented by the Union prior to September 1, 1995; (2) how did the employee feel about things without the Union and since the employee handbook was in effect; and (3) would the employee be willing to testify at the March unfair labor practice hearing. The employees were not told the interviews were voluntary or that there would be no reprisals for failing to cooperate in the interviews.

The Board in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965), set forth the standard that an employer must use in questioning employees for trial preparation purposes:

> Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the rights of employees.

The Respondent did not give the questioned employees any of the warnings required by *Johnnie's Poultry*. Additionally, some of the Respondent's questions went to the core of the employees' protected right not to disclose their union sympathies to their employer. The inquiries of the employees' "feelings" about not having union representation and the impact of the changed terms and conditions of employment were not shown to be reasonably designed to obtain relevant evidence for use in the unfair labor practice hearing. I find that under all the circumstances the interrogation of the employees by McCain and Gaul violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. L & L Wine and Liquor Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 337, International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for collective bargaining purposes:

> All full-time and regular part-time drivers, driver-helpers and warehouse employees employed by L & L Wine and Liquor Corporation at or out of its Troy, Michigan facility; but excluding all office clericals, sales employees, guards and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct.

(a) Unlawfully interrogating employees.

(b) Telling employees that it wanted to get rid of the Union.

5. Respondent violated Section 8(a)(1) and (5) of the Act by

(a) Seeking to undermine the Union, including dealing directly with employees, offering an employee a promotion and raise, suggesting a bribe to union representatives, and telling employees they could receive raises and other incentives without union representation.

(b) Withdrawing recognition from the Union and refusing to bargain with the Union.

(c) Making unlawful unilateral changes in unit employees' terms and conditions of employment.

6. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not violated the Act except as specified.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having unlawfully withdrawn recognition from the Union on August 24, 1995, Respondent must, on request, bargain with the Union. On demand by the Union, the Respondent shall restore any such terms and conditions of employment to the status quo as they existed as of August 24, 1995, and shall make whole its unit employees for losses of wages or benefits resulting from the Respondent's failure to continue these terms, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also reimburse its unit employees for any expenses ensuing from the Respondent's unlawful failure to make the required benefit payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, supra. The Respondent shall also remit all fringe benefit amounts which have become due. Any additional amounts due the employee

benefit funds shall be as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, L & L Wine and Liquor Corporation, Troy, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully Interrogating employees.

(b) Telling employees that it wanted to get rid of the Union.

(c) Seeking to undermine the Union, including dealing directly with employees, offering an employee a promotion and raise, suggesting a bribe to union representatives and telling employees they could receive raises and other incentives without union representation.

(d) Withdrawing recognition from the Union and refusing to bargain with the Union.

(e) Making unlawful unilateral changes in unit employees' terms and conditions of employment.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the employees in the appropriate unit for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful withdrawal of recognition, refusal to bargain with the Union, and unilateral changes as set for in the remedy section of this decsion.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(c) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time drivers, driver-helpers and warehouse employees employed by L & L Wine and Liquor Corporation at or out of its Troy, Michigan facility; but excluding all office clericals, sales employees, guards and supervisors as defined in the Act.

(d) Within 14 days after service by the Region, post at its facility in Troy, Michigan, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 29, 1995.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Local 337, International Brotherhood of Teamsters, AFL–CIO as the exclusive bargaining representative of our employees in the unit described below, by withdrawing recognition from the Union and unilaterally implementing changes in wages and terms and conditions of employment of these employees at a time when no impasse in bargaining with the Union has occurred.

WE WILL NOT interrogate our employees about their union activities or sympathies.

WE WILL NOT tell our employees that we want to get rid of the Union.

WE WILL NOT seek to undermine the Union, including dealing directly with our employees, offering them promotions and raises, or suggesting a bribe to union representatives.

WE WILL NOT tell our employees we could give them larger raises and other incentives if they were not represented by the Union.

WE WILL NOT make unlawful unilateral changes in our employees terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time drivers, driver-helpers and warehouse employees employed by L & L Wine and Liquor Corporation at or out of its Troy, Michigan facility; but excluding all office clericals, sales employees, guards and supervisors as defined in the Act.

WE WILL make whole the employees in the unit for any loss of earnings and other benefits suffered as a result of our unlawful withdrawal of recognition of the Union, our refusal to bargain with the Union and our unilateral changes in employees terms and conditions of employment.

L & L WINE AND LIQUOR CORPORATION